

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1924

Collective Labor Agreements in American Law

Ralph F. Fuchs

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Fuchs, Ralph F, "Collective Labor Agreements in American Law" (1924). *Articles by Maurer Faculty*. 1541.
<http://www.repository.law.indiana.edu/facpub/1541>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

ST. LOUIS LAW REVIEW

Vol. X

Published by the Undergraduates of the
Washington University School of Law

No. 1

COLLECTIVE LABOR AGREEMENTS IN AMERICAN LAW.*

1. THE STRATEGIC IMPORTANCE OF COLLECTIVE LABOR AGREEMENTS.

Robert Franklin Hoxie, in his notable book on Trade Unionism in the United States¹ remarks: "Among the main fundamental forces and conditions that determine what ought to and can be done in the solution of labor problems, we find that the present legal status determines most largely the actual conditions and problems of labor, and that most labor problems must be solved in terms of rights and law by invoking present rights and law." If this be true, as it undoubtedly is, it is small cause for wonder that American trade unionism is losing much of its earlier contempt for political action and for the courts as adjudicators of its disputes with employers. Even the casual newspaper reader must have noticed in the years since the war the increasing extent to which labor disputes in court have been fought tenaciously, with the unions not always on the defensive.

It is significant in this connection that there is, in the words of one observer,² "an apparently growing readiness of the parties to . . . [collective labor] agreements to ask for adjudications under them from the courts"; for it is collec-

*By Ralph F. Fuchs.

1. D. Appleton & Co., 1917, p. 211.

2. Lindley D. Clark in 14 Monthly Labor Review, 818 (April, 1922).

tive labor agreements which are the objective of all collective bargaining and which, once signed, become the law of the parties to them. The attitude which the courts take toward such agreements will determine the relation between our common and statutory law on the one hand and the law of the parties to trade and industry on the other hand, just as the standing in court of the orders of administrative boards and commissions determines their place in the modern scheme of control.

In view of this strategic importance of collective labor agreements it is somewhat surprising to discover that their legal nature has never been carefully considered or precisely defined in an American court decision. There have been various dicta uttered upon the subject and there are numerous decisions which enforce or refuse to enforce specific clauses of collective labor agreements; but there has not been discovered any comprehensive examination into the nature of such agreements taken as a whole.

A sufficient explanation of the absence of legislative or judicial definition of the position in law of collective labor agreements is the inherent difficulty of the matter. Frequently there are multitudinous parties to such agreements, whose representation in the negotiations leading up to them raises complicated questions of agency, and who create decided obstacles to enforcement at law or in equity. There are unincorporated labor unions and employers' associations involved, whose standing in court has only recently been somewhat clarified. Finally, each of the numerous parties may or may not be held to be subject to all or a few of a host of rights, privileges, powers, immunities, duties, liabilities, and disabilities,³ which may or may not be created by collective labor agreements. The very difficulty of the mat-

3. The classification of jural relations here adopted is the one developed by Wesley Newcomb Hohfeld in his article in 23 Yale Law J. 16, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," reprinted in a collection of essays bearing the same title. Yale University Press, 1913.

ter, however, coupled with its importance, makes it desirable to attempt to answer the question of whether or not such agreements are enforceable at law and, if so, to what extent.

In such literature and decisions as exist upon the subject there are four tendencies discernible upon the subject of the legal nature of collective labor agreements: (1) the tendency to look upon such agreements as mere memoranda of usage; (2) the tendency to view them as moral obligations; (3) the tendency to regard them as contracts; and (4) the tendency to recognize in them a unique species of juridical act. These four tendencies will be taken up in order.

2. COLLECTIVE LABOR AGREEMENTS AS MEMORANDA OF USAGE.

A collective labor agreement, says the Supreme Court of Kentucky, in *Hudson v. Cincinnati, New Orleans, and Texas Pacific R. Co.*,⁴ is "not a contract" and "comes squarely within the definition of usage." Wherever that view of the matter is accepted, the question of the direct enforcement of collective labor agreements cannot arise. A usage, unless enacted deliberately into a rule of law, cannot be enforced; and the fact that it may look in some respects like a contract will make no difference so long as it is considered to be a usage rather than a contract.

A usage may be, however, and frequently is, incorporated into a separate and distinct agreement which may be a contract and be enforceable as such. The individual employment relation gives rise to a true contract; and when the particular employer and worker who enter into it are directly or indirectly concerned in a collective labor agreement it obviously may be true that they intend to incorporate certain of the terms of the collective agreement into their individual contract.⁵ The collective labor agreement will in

4. 152 Ky. 711; 154 S. W. 47 (1913).

5. It has been pointed out by Dean Arthur L. Corbin in an article on Offer and Acceptance and some of the Resulting Legal Relations, 26 Yale Law J. 169 (Jan., 1917), that there is no such thing as the individual contract

that event remain a mere usage; it will be no more enforceable by itself as between those concerned in it than it was before; and certain of its provisions may have no application to the particular individual contract. The applicable provisions will, however, be enforceable indirectly as terms of the individual contract. Such indirect enforcement has frequently been given to certain terms of collective labor agreements.

The only question of any difficulty that arises in cases where collective labor agreements are regarded as memoranda of usage is the question of whether under the particular facts the parties to an individual contract intended to incorporate into it the terms of a collective agreement. This question turns upon what constitutes adoption of a usage; and upon this point in connection with collective labor agreements there is great diversity of judicial opinion.

A liberal case is *Gregg v. Starks et al.*⁶ The plaintiff was a passenger conductor of the Louisville and Nashville Railroad. The defendant was a freight conductor who sought to displace the plaintiff, the question being one of seniority as between different classes of conductors. The railroad was joined as a nominal defendant. Despite the fact that the plaintiff was not a member of the Brotherhood of Railroad Trainmen the decision was based entirely upon the agree-

of employment, in the usual sense of the term, in connection with the ordinary hiring at will. The parties do not get together and establish rights in personam against each other which thereafter can be enforced. Neither of them really agrees in advance to do anything unconditionally. But as soon as they act in accordance with their understanding by entering into the relation of employer and employee, and for as long a period as they continue in that relation, certain enforceable rights and duties do arise. These are in part contractual rights and duties because the parties, in contemplation of law, fixed them in the first place of their own free wills. Payment of the stipulated wages for work actually performed is mentioned by Dean Corbin as a contractual duty of the employer towards his employee, who has the corresponding right in personam to receive the wage. It is submitted that there may be other rights and duties without number, such as those arising from a promise on the part of the worker not to join a union during the continuance of the employment. It is such rights and duties which, according to the view now under discussion, may be taken over from a collective labor agreement.

6. 188 Ky. 834; 224 S. W. 459 (1920).

ment between the brotherhood and the company, on the ground that the terms of the collective labor agreement constituted a usage which the plaintiff and the company obviously intended should govern their relations and upon which the former was entitled to rely. Naturally the same thing was true as to the defendant and the company. The plaintiff was granted an injunction to protect his right to his run.

In *Burnetta v. Marceline Coal Co.*⁷ the court went to the other extreme, holding that the terms of a collective labor agreement must be adopted expressly if at all, even as between a member of a union and an employer who has an agreement with the union. In that case a coal miner sued for pay which he had admittedly earned at the time he left the employ of the defendant company. The company cited an agreement with the United Mine Workers which entitled it to hold the amount in litigation until the end of the two-week pay period following the one in which the plaintiff quit, and it expressed its willingness to pay at that time. The decision affirms a judgment for the plaintiff, the court holding that the miners' union could not contract for the plaintiff, that its agreement with the defendant did not constitute a memorandum of usage which was impliedly incorporated into the individual contract of employment between the plaintiff and the defendant, and that in the absence of an express adoption of the terms of the collective agreement by the parties to the individual contract the ordinary rules of law should govern. The ordinary rule of law is that an employer must pay wages due within a reasonable time after the termination of an employment; and the plaintiff in the opinion of the court had permitted a reasonable time to elapse before bringing suit.

In *Langmade v. Olean Brewing Co.*⁸ there were special circumstances which served to rebut any presumption that

7. 180 Mo. 241; 79 S. W. 136 (1904).

8. 137 App. Div. 355; 121 N. Y. Supp. 388 (1910).

might have existed in their absence as to the adoption of the terms of a collective labor agreement as a usage. The plaintiff in that case was suing his employer for overtime pay to which he was entitled under a collective labor agreement negotiated by the union of which he was a member. The plaintiff during his employment had made frequent demands for overtime pay which had each time been refused. The court ruled that his continuance in employment under such circumstances demonstrated that his individual contract of employment, informal as it was, could not be held to have had incorporated in it the terms of the collective labor agreement.

In the case of *Hudson v. Ry. Co.*, *supra*, the plaintiff, a locomotive engineer formerly in the defendant's employ, sued for lost time following his summary discharge for infraction of the company's rules. He based his claim upon a provision in the collective agreement of his union with the company, providing for a hearing within ten days for any engineer who believed himself unjustly discharged. The plaintiff was refused such a hearing, and his claim was that the company had violated its contract to his damage. After defining collective labor agreements as memoranda of usage, the court went on to state that the particular clause in question could not be held to have been incorporated by the plaintiff and the company into the plaintiff's individual contract of employment, for the reason that his contract was an ordinary hiring at will, with which a provision for a hearing would have been inconsistent.

In *Mastell v. Salo*,⁹ the plaintiff, a coal miner, was permitted to recover certain wages from his employers because the jury found that he was entitled to them under the terms of his individual contract of employment. The court held that the jury was correctly charged that the plaintiff could not recover upon the collective agreement of his union with

9. 140 Ark. 408; 215 S. W. 583 (1919).

his employer, notwithstanding the fact that the agreement expressly prohibited individual contracts inconsistent with its terms. In other words, a collective labor agreement cannot by its own terms be made anything more binding than usage upon the individuals concerned in it. They may incorporate it into their own contracts or not, just as they see fit, and it derives no force from its own wording. In the particular case certain terms of the agreement were held to have been incorporated into the plaintiff's contract.

It is clear that in all of the foregoing cases the collective labor agreements which were involved were legal nullities. Of themselves they bound no one. In certain cases, however, where the facts warranted such a conclusion, they were vitalized as to certain terms by being expressly or impliedly incorporated into contracts to which the courts could give effect. A slight advance from this position toward direct legal enforceability of collective labor agreements is made by the view that such agreements are morally binding upon the parties to them.

3. COLLECTIVE LABOR AGREEMENTS AS MORALLY BINDING OBLIGATIONS.

The view that collective labor agreements probably are binding in morals but are not binding in law is a convenient refuge for two classes of commentators upon the subject: those who believe that the courts should stay out of the field of enforcing such agreements and those who believe that the complicated nature of the rights and obligations involved makes it impossible—however desirable it otherwise might be—for the courts to deal with them effectively. These two classes together constitute by far the larger number of those who have written upon the subject.

The President's Industrial Conference in 1920, for example, reported with reference to collective labor agreements that "For the present at least enforcement must rest substan-

tially upon good faith.”¹⁰ The same view was taken in 1916 in both major reports of the United States Commission on Industrial Relations. The report of the Director of Research and Investigation states that “It does not seem, nor has it been urged by any careful student of the problem, whether employer or workman, that any good end would be served by giving legal validity to joint agreements.”¹¹ Similarly the majority of the British Royal Commission on Labor in 1894 expressed the opinion that “It does not appear that such collective agreements can be . . . otherwise than morally binding.”¹² Commons and Andrews in their book on the Principles of Labor Legislation brand the collective labor agreement as “merely a ‘gentleman’s agreement,’ a mutual understanding, not enforceable against anybody There is no legal penalty if the individual contract is made differently. To enforce the collective contract would be to deny the individual’s liberty to make his own contract.”¹³ Elsewhere it is stated that “Real collective bargaining requires getting together in a joint conference, and, through representatives, making a trade agreement binding upon individuals on both sides.”¹⁴

There are, of course, numerous fields in which the demands of good morals exceed the demands of the law; but law makes its progress by following in the path of morals, now lagging far behind, now crowding close upon the heels of morality, and at times even making a spurt in advance. Those who express the view that collective labor agreements are moral obligations, therefore, are unconsciously furnishing grounds for the law to try its hand at giving legal effect to them. This is especially true as regards courts of equity,

10. Reprint of the report of the Conference in the Eighth Annual Report of the Secretary of Labor, p. 256.

11. Final Report and Testimony, v. 1, p. 120.

12. Fifth and Final Report, p. 54.

13. Harper and Brothers, 2nd ed. 1920, p. 118.

14. *Ibid.*, p. 120.

where there still remain ways to give limited effect to that vast residuum of "good conscience" which has not been crystallized into the formal doctrines of equity jurisprudence.

In suits for injunctions, for example, courts of equity must judge of the legality of the acts sought to be enjoined, which, especially when the acts are done by a combination of persons, depends upon their purpose. Violations of clear moral obligations on one side or the other are, naturally, important evidence of the good or evil intent of the acts which the courts must enjoin or refuse to enjoin. Accordingly there is authority that, while compliance with collective labor agreements cannot be enforced and no damages can be collected for their violation, some acts can be enjoined wholly or partly because they are or tend to produce violations. Conversely, an injunction is sometimes refused because the plaintiff has broken a collective labor agreement and has thereby justified the acts complained of, or because the defendant was merely trying to enforce an agreement. In most of these cases it is difficult to determine whether the courts regard the collective labor agreements which are involved as contracts or as mere moral obligations; but there are cases in which the latter view appears to be taken.

In a group of Massachusetts cases in which a collective labor agreement was variously given effect and disregarded there seems to have been a considerable amount of confusion in the mind of the court regarding the precise legal nature of the agreement. The only conclusion possible is that the collective labor agreement created certain moral obligations which, under certain circumstances, the court, as a court of equity, would take into account, but which under other circumstances would prove to be not legally binding. In *Tracey et al. v. Osborne et al.*,¹⁵ a suit for an injunction was brought by the members and representatives of one shoe

15. 226 Mass. 25; 114 N. E. 959 (1917).

workers' union against the members and representatives of another. The plaintiffs were seeking to protect a union-shop agreement, which they had with certain employers, against interference by the defendant union, which evidently had secured the discharge from employment of some of the plaintiff union's members. The court held that an injunction should issue, but the language of the decision is far from exact and it is not possible to determine whether the court sought to protect the collective agreement or the individual employment "contracts" of the union members. The latter are mentioned; but the union is referred to as the plaintiff and the union-shop "contract" is declared to be within the law. On the whole one gets the impression that it is the collective agreement which is taken to justify the issuance of the injunction and that such an agreement is entitled to the same protection as contracts generally.

In *Shinsky v. Tracey et al.*,¹⁶ decided on the same day as *Tracey v. Osborne*, the same collective labor agreement is treated as a nullity. The plaintiff had been a member of the defendant union at the time that it entered into its union-shop agreement with the employers, but he had subsequently been expelled according to the union's rules and the union had thereafter secured his discharge and prevented his further employment. The court, which took persecution of the plaintiff and making him an example to the union's membership to be the motives actuating the union, awarded damages to the plaintiff. The claim that he was bound by the union-shop agreement was disallowed on the ground that his individual contract of employment said nothing about his remaining in the union. The same plaintiff, however, had less success two years later in a similar action against the same union. In *Shinsky v. O'Neil et al.*,¹⁷ it was found that the union was treating the plaintiff no differently from other non-union men and that it merely was employing

16. 226 Mass. 21; 114 N. E. 957.

17. 232 Mass. 99; 121 N. E. 790 (1919).

legitimate means to enforce its union-shop agreement. An injunction was refused.¹⁸

In *Smith v. Bowen et al.*,¹⁹ decided the same day as *Shinsky v. O'Neil*, the plaintiff sought an injunction against a shoe workers' union which had struck to enforce his discharge. The plaintiff had been refused membership by the union and the union claimed that its strike was simply to enforce a union-shop agreement which it had with the employer. No malice was shown, and the case has all the indications of a test case. The Supreme Court of Massachusetts concluded in its decision that the agreement relied upon made no provision for a closed union shop and that none could be implied from provisions for shop committees and for visits of a union agent to the shop. Accordingly the strike was declared to be without justification and the plaintiff was held to be entitled to an injunction. The court expressly stated, however, that a union-shop provision in the collective agreement would have justified the strike and necessitated a decision for the defendants.

In Great Britain, it may be mentioned in passing, the question of legal enforcement of collective labor agreements has not come up in the courts. Since 1871 the Trade Union Act²⁰ has made it virtually impossible for such agreements ever to be enforced. Section 4 provides that nothing in the Act shall enable any court to enforce directly or to award damages for the breach of agreements falling within a number of classes, among others, "Any agreement between one trade union and another." In Great Britain the term, trade union, includes associations of employers as well as of workmen.

18. The difference between the two Shinsky cases arises largely out of differences in the facts found by the respective masters in chancery as to the motives of the union—persecution in the one case and legitimate enforcement of an agreement in the other. The appellate court probably had no alternative to deciding each case upon the facts as found; but the two cases are an interesting example of the effect upon judicial action of varying interpretations of economic motives.

19. 232 Fass. 106, 121 N. E. 814.

20. 34 & 35 Vict. c. 31.

Of course, Section 4 of the Trade Union Act, since it merely rules out a change in the law which the Act might otherwise have been interpreted to make, would not affect any agreements which were enforceable before 1871. Accordingly, if collective labor agreements had been enforceable at common law they might still be. But in Great Britain virtually all trade unions of employers and of workmen have been held to be in restraint of trade under the common law and their agreements, consequently, have been unenforceable for the same reason that other agreements in restraint of trade cannot be enforced.²¹

4. RIGHTS AND OBLIGATIONS UNDER COLLECTIVE LABOR AGREEMENTS VIEWED AS CONTRACTS.

In searching the now well-known "legal armory" for an adequate weapon with which to dispose of the problem of collective labor agreements the American courts, unrestrained as they are by legislation, are not likely to rest content with such a toy dagger as the incidental power of courts of equity to take account of the moral element in certain situations. They are more likely to seize upon so conspicuous a battle axe as the concept of contract, and will be concerned chiefly with discovering whether it has any structural flaws or weaknesses which render it inadequate to the occasion. The entire fitness of the weapon has been asserted frequently, chiefly by employers or their representatives.

"It is wrong," says Law and Labor, the official organ of the League for Industrial Rights, "for a man to breach his contract and thereby destroy the contract right of another. It is wrong for a third person willfully to induce a

21. It would be logically possible for some court to hold that the Trade Union Act had given validity to agreements between labor unions and individual employers, which are not mentioned in Section 4. The suggestion does not seem, however, to have been made. Such an agreement was under consideration in *Read v. Friendly Society of Operative Stone Masons*, [1902] 2 K. B. 88, 732.

man to breach his contract. It is a greater wrong for men to conspire and through the power of organization to persuade or compel one another to break their collective or individual agreement.”²² The entire editorial from which this quotation is taken, not questioning that collective labor agreements are full-fledged contracts, argues for their protection at law on the same basis as other contracts. It thereby sets forth the frequently-expressed opinion of the League, which has fought and won for employers many of the most famous American labor cases.²³

The tendency of the courts to make similar assumptions as to the contract nature of collective labor agreements is marked. Frequently one strikes a rather ambiguous passage, which conveys the impression that such agreements are contracts. Such a section is contained as a dictum in the opinion of the Supreme Court of Massachusetts in *Reynolds v. Davis*,²⁴ where the court says: “We have excluded all cases where the employees are under contract to work for their employer, because it is now settled in this commonwealth at least that competition and similar defenses are not a justification for inducing an employee or other person to commit a breach of contract and thereby interfere with the business of the employer From that it would seem to follow necessarily that, in case of persons under a contract to work, a strike or combination not to work, in violation contract, to secure something not due to them under that

22. V. 5, p. 82 (April, 1923).

23. Arguments and schemes for making collective labor agreements legally binding are contained in the following: Fifth and Final Report of the British Royal Commission on Labour (1894), p. 115; Report of the United States Industrial Commission (1902), v. 19, p. 857; articles by Julius Henry Cohen and Magnus W. Alexander in *Annals of the American Academy of Political and Social Science*, v. 90, pp. 47 & 61 (July, 1920). Secretary of Labor Wilson opposes legal enforceability for collective labor agreements, on the ground of unfairness to the workers, in his Eighth Annual Report, p. 30. Lindley D. Clark of the United States Bureau of Labor Statistics favors it because of present unfairness to workers in an article in the *Monthly Labor Review*, v. 12, p. 416 (Feb., 1921).

24. 198 Mass. 294; 84 N. E. 457 (1908).

contract, would be a combination interfering without justification with the employer's business.'"

In so far as the mere terms of collective labor agreements are concerned, it may be asserted that, contrary to a frequently-expressed view, there is no good reason why such agreements cannot be held to be contracts. The real difficulties which arise in connection with such agreements when it is attempted to enforce them as contracts, have to do with the question of whether or not all those who are supposed to be parties can be held to have become such in a manner sufficiently akin to the way in which the parties to ordinary contracts bind themselves. Assuming for the present that they do and that collective labor agreements might be made legally binding upon those directly affected by them, it is worth while to examine the nature of the rights and obligations which would be created, in order to dispose of the question of whether they can be regarded as contractual rights and obligations.

The ordinary collective labor agreement prescribes minimum wages and maximum hours for the workmen affected. Certain working conditions are also set forth and certain disciplinary rules laid down. Sometimes the employer agrees not to hire anyone but union members, and occasionally the workers agree not to work for anyone but the employers entering into the agreement. Strikes and lockouts are prohibited by implication if not expressly. Often specific penalties for violations are provided, and sometimes machinery for the hearing and adjustment of complaints is set up. Other frequent provisions might be mentioned. Each of these sets of provisions implies a bundle of legal rights and obligations, some of which may be set forth here.

The employers and workers individually still have their pre-existing privileges of hiring and entering into employment. These are abridged, however, by duties imposed by the agreement and applicable to the individual parties, not to hire union members or to work for the employers upon

terms which run counter to those in the agreement. The workers, once they accept employment under the agreement, have rights to receive the specified wages. The parties, furthermore, are under duties not to violate the working conditions and disciplinary rules, any infraction of which gives rise to a right of action in the parties adversely affected and may also give rise to the power to apply the specified penalties or the privilege of invoking the adjudicatory machinery. There are duties resting upon all of the parties to play their assigned parts in carrying on the joint machinery, as, for instance, where it is incumbent upon the union and the employers' association to appoint conciliators who shall hear and adjudge complaints. These conciliators, further, are given powers over the parties under certain circumstances. Where there is a union-shop provision in an agreement the employers are under a duty not to hire anyone but members of the union. Each of the parties, lastly, has rights against all of the others that they shall refrain from obstructing the operation of the agreement by strikes, lock-outs, and the like.

It is difficult to see any reason why these mutual rights and obligations should fall short of being enforceable as contractual rights and obligations—still assuming them to be adequately agreed to.²⁵ To be sure, the contracts of which they would be the consequences would not be contracts of employment; but there is no reason to suppose that actual contracts of employment²⁶ are the only kind of contracts that

25. Certain of the attempted rights and duties might easily be invalid for one reason or another without affecting the validity of collective labor agreements as a whole. The same thing is true with regard to other contracts, such as those involving penalties and those in restraint of trade. The closed shop has been held to be an illegal restraint of trade in Colorado. *Campbell et al. v. People*, 72 Colo. 213, 210 Pac. 841 (1922). So with the monopolistic closed shop in New York. *McCord v. Thompson-Starrett Co.*, 129 App. Div. 130, 113 N. Y. Supp. 385; aff. 198 N. Y. 587, 92 N. E. 1090 (1910).

26. In the sense outlined in Note 5 or in the case of contracts to work for definite periods.

can be concerned with the relation of employer to employee, any more than there is reason to suppose that contracts of sale are the only kind that can be entered into with reference to the production and exchange of goods. Yet it has been a frequent practice of the courts to declare that collective labor agreements are not contracts of employment and therefore cannot be contracts at all,²⁷ or else that they are attempted contracts of employment, the enforcement of which would involve involuntary servitude.

The Supreme Court of Michigan in *Schwartz et al. v. Cigar Makers' International Union et al.*,²⁸ applied the involuntary servitude argument to the full. The plaintiff had discharged his union employees in violation of a union-shop provision in his agreement and had replaced them with non-union cigar makers. He sought an injunction against the picketing of his shop, with which the union had retaliated. The union filed a cross bill, asking for an injunction against the plaintiff's continuing the manufacture of cigars with non-union workmen. The opportunity for work with which they were supplied by the plaintiff's factory was unique, the workmen claimed. They were entitled to it by contract and the plaintiff should be prevented from offering it to others, just as an opera singer who is under contract may be enjoined from singing for anyone but his employer. The court could not see the point, however, and took the untenable position that the injunction asked for against the plaintiff would have been tantamount to a decree of specific performance, which may not be granted in connection with contracts of service. It saw no objection, on the other hand, to issuing the injunction against picketing for which the plaintiff had asked.²⁹

27. See the cases cited above, holding that collective labor agreements are mere memoranda of usage.

28. 219 Mich. 589; 189 N. W. 55 (1922).

29. In the earlier case of *Schwartz et al. v. Wayne Circuit Judge*, 217 Mich. 384, 186 N. W. 522 (1922), the court had gone to the length of ordering the trial judge to enjoin the picketing.

Most of the doubt as to the application of the principle which forbids involuntary servitude seems to spring from misinterpretations of a famous opinion of Judge (later Justice) Harlan in *Arthur et al. v. Oakes et al.*³⁰ The opinion reverses the lower court and removes an injunction against a threatened strike upon the Northern Pacific Railway upon the ground that "The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for services of that character." The language is carefully limited and states nothing which should prevent enforcement of any of the usual provisions of collective labor agreements, as outlined above.

Much more in accord with a sound view of the matter than the Michigan case just cited is a statement in *Lovely et al. v. Gill et al.*³¹ The court there states: "It may be that there are provisions which a court of equity in its discretion would not enforce by specific performance. But the denial of such relief would not render the entire contract illegal or voidable." In the opinion just quoted three cases are decided together. In them the Massachusetts court seems to have gone over completely to the contract view of collective labor agreements. The cases arise in connection with a war between the Boot and Shoe Workers' Union and the Shoe Workers' Protective Union, and in two of them union-shop agreements between the first-named union and certain employers are protected by injunction against interference by the Shoe Workers' Protective Union on the ground that they are legal contracts. The injunctions are issued, respectively, in behalf of the injured union and in behalf of an injured employer.

30. 63 Fed. 310 (C. C. A., 1894).

31. 245 Mass. 577; 140 N. E. 285 (1923).

There are a number of other cases in which the courts have found no difficulty in enforcing specific provisions of collective labor agreements against individual and collective parties to them, both at law and in equity. *Nederlandsch Amerikansche Stoomvaart Maatschappij v. Stevedores' and Longshoremen's Benevolent Society et al.*,³² is an admiralty case in which the Holland-America Steamship Company recovered damages against the defendant union for its breach of a collective labor agreement entered into by the union and various ship agents of the port of New Orleans, including the agent of the libelant. It was stipulated in the agreement that in the event of an unauthorized strike of longshoremen the union would replace the striking workers with others. Such a strike occurred while one of the libelant's ships was being unloaded, and the defendant union failed to make any effort to carry out the agreement. The court treated the agreement as a contract in making its decision.

In *Stone Cleaning and Pointing Union v. Russell*,³³ the court, while it was somewhat in doubt as to just what a collective labor agreement is in law, seemed to incline to the view that it is a contract which is properly vindicated in an action for damages. The union in that case had a union-shop agreement with the defendant, and it sought to restrain him from hiring anyone but its members. The decision declares that the union, "if it has any cause of action, will have an adequate remedy at law, just as would any other employee wrongfully discharged."

It is the injunction, however, which has been the favorite resort of litigants seeking to enforce collective labor agreements. *Schlesinger et al. v. Quinto et al.*,³⁴ is a leading case which was given considerable attention in the press at the time it was decided. The defendants were members of an

32. 265 Fed. 397 (1920).

33. 38 Misc. 513; 77 N. Y. Supp. 1049 (1902).

34. 201 App. Div. 487; 194 N. Y. Supp. 401 (1922).

employers' association in the New York garment industry and were seeking in combination to reintroduce the piece-work system into the industry in spite of the fact that an unexpired agreement with the plaintiff union provided for weekly wages. The court held that the agreement was a binding contract and that the inadequacy of damages as compensation for its violation in the manner alleged and proved justified the issuance of an injunction forbidding the violation.

Herman Leveranz v. Cleveland Home Brewing Co.,³⁵ is a case which was decided in the Court of Common Pleas of Cuyahoga County, Ohio, and is reported in 4 Law and Labor 220. The plaintiff, a member of a brewery workers' union, suing in behalf of the union, sought to enjoin a conspiracy on the part of certain employers to reduce wages in violation of an existing collective agreement. The court held that the union as a whole had an interest in seeing that wages were maintained and that the action was a proper one to bring. The injunction was awarded. The case is noteworthy because of the realistic view which the court took of the economic situation and of the interests involved.

Gilchrist Co. v. Metal Polishers', Buffers', and Platers' Local Union No. 44 of Metal Polishers' International Union et al.,³⁶ and *Burgess et al. v. Ga., Fla., and Ala. R. Co.*,³⁷ are both cases in which strikes were enjoined in suits by employers because they would have been in violation of collective labor agreements entered into by the defendant unions. In both cases the officers and members of the union were enjoined from inciting the strike.

In *Segenfeld et al. v. Friedman et al.*,³⁸ the plaintiff employer was denied a permanent injunction against the picketing of his embroidery works, partly because he previously

35. 24 N. P. (N. S.) 193 (1922).

36. (N. J. Ch.); 113 Atl. 320 (1919).

37. 148 Ga. 415; 96 S. E. 864 (1918).

38. 117 Misc. 731; 193 N. Y. Supp. 128 (1922).

had attempted to reduce the wage scale in violation of an existing agreement with the union. The court regarded the agreement as a contract and held that the plaintiff had deprived himself of the "clean hands" which are necessary to one who seeks the aid of equity. A similar case is *Greenfield v. Central Labor Council of Portland et al.*³⁹

It is difficult, in view of the foregoing, to believe that there is anything in the nature of the legal rights and obligations suggested by collective labor agreements which would prevent such agreements from being considered to be contracts in the eyes of the law. The rights, duties, privileges, and the like, which would be created, are definite and on the whole are capable of legal enforcement. There is, also, sufficient mutuality of benefit and of obligation to satisfy all requirements of consideration and of equity. But that is only half the story. One can imagine many valid contracts of many sorts which might exist but do not: they simply have not been called into being. So with collective labor agreements; it may be that the operative acts which would be necessary to constitute them actual contracts are not, or else cannot be, performed. This question merits separate consideration.

5. THE FORMATION OF COLLECTIVE LABOR AGREEMENTS.

The feature of contract rights and obligations⁴⁰ which distinguishes them from those arising out of legislation and out of common-law rules, is the fact that in the eyes of the law they are created voluntarily by the persons affected. They would not exist but for certain affirmative acts of the contracting parties; and it has been the constant aim of equity to see to it that no legally-recognized contracts should be tainted with fraud and duress such as would deprive them of their voluntary character. If it be true that economic

39. (Ore.), 192 Pac. 783 (1920).

40. Exclusive of rights and obligations arising from implied contracts and quasi-contracts.

pressure has not been sufficiently recognized in law as a factor limiting the voluntary character of certain contracts, it is also true that this lapse has not been due to any conscious departure by the courts from the traditional end of keeping contracts genuinely free.

It would be a mistake, however, to suppose that subjection to legal liability for the non-performance of promises is as much a matter of choice as the making of the promises themselves. The law has never been particular about inquiring whether the parties to contracts had a judge and jury in mind when they bound themselves to each other by offer and acceptance. If people choose to make contracts they will be held to them at law, even if they had intended to stay out of court entirely. It is sound public policy that this should be so in the great majority of instances.

What the courts must decide in connection with collective labor agreements, accordingly, is whether the parties affected actually do make promises to each other with a sufficient degree of freedom and of intention on their part to justify the law in holding them to their agreements. They need not, on the other hand, greatly concern themselves with whether or not the parties enjoy being haled into court later on—although this is decidedly a proper question for legislative consideration in dealing with the matter. The extent to which the parties to collective labor agreements actually bind themselves must be taken up as it affects two classes of parties: the organizations on each side and the individuals on each side; for it has become apparent by this time that collective labor agreements, if they are contracts at all, are not simple bilateral contracts but are complex instruments with distinct rights and obligations attaching to several sets of parties.

Where the employer—individual, partnership, corporation, or trust—signs a collective labor agreement directly, no question of the consent given by that employer can be raised. If the agreement is a valid contract in other respects, no

difficulty will be found in holding such a party to his duties or in enforcing his rights. Many of the cases cited throughout this article were decided for or against such employers.⁴¹

In the numerous instances, however, in which individual employers and workers are bound, if at all, only by the action of employers' associations or labor unions of which they are members, knotty problems of agency and consent must be solved. Occasionally the problems are even more difficult, as, for instance, where the individual parties on one side or the other are not represented by an organization but simply by delegates chosen more or less informally. In all such cases the courts must decide whether by the use of agents or by some process of ratification the individual parties to the collective labor agreements have attached specified rights and obligations to themselves as individuals.

Decisions have already been cited which declare that under no circumstances can a labor union or its officers contract for its members.⁴² This view of the matter is produced by the same confusion of thought as that which prevails with regard to the individual contract of employment. It has been pointed out above⁴³ that in connection with the ordinary hiring at will there is no contract of employment at all until the parties have actually entered into the relation of employer and employee. Until that time there is no right or duty on either side. After that time, furthermore, there is no right or duty extending into the future; for either party can break off at will. The duties of each party are contingent upon performance by the other party, and perform-

41. See, for instance, *Lovely et al. v. Gill et al.*, *Nederlandsch Amerikansche Stoomvaart Maatschappij v. Stevedores' and Longshoremen's Benevolent Society et al.*, and *Burgess et al. v. Ga., Fla., and Ala. R. Co.*, *supra*.

42. See *Burnetta v. Marceline Coal Co.*, *supra*. In *W. A. Snow Iron Works, Inc., v. Chadwick et al.*, 227 Mass. 382, 116 N. E. 801 (1917), the court said: "The officers of the union could not create by either word or conduct a binding bargain in behalf of the members of their union to furnish labor to be individually performed, unless they had been authorized expressly or impliedly by the members in some form sufficient to show mutuality of will and consent."

43. See Note 5.

ance by one party, in the absence of a discontinuance of the employment relation by the other party, gives rise to enforceable contract rights. Notwithstanding this contingent nature of contracts of employment, the courts and commentators have fallen into the habit of looking upon such contracts as something preceding the employment relation and in some manner tying the parties to each other. It seems likely that the same misconception may be a strong factor in causing some courts to be fearful of holding that labor unions can bind their members. The question, consequently, has come to be looked upon primarily as a matter of policy in relation to this sort of contractual rights and duties rather than as a problem of agency and consent.

But the question in reality does not turn upon the formation of a binding contract to create individual employment relations. It has to do, instead, with the creation of a different sort of contract, which cannot control the relation of the individual employer and worker to each other unless they enter into that relation of their own wills, and which can control it only so long as they remain each others' employer and employee. By becoming employer and employee they can, if the courts see fit, be held to call into play the contingent terms of their collective agreement just as easily as, in the absence of such an agreement, they could be held to call into force the terms of some pre-existing understanding of their own. Either they could be held to conform to the requirements of the collective contract as it affects their relation, or they could be held to incorporate into their own contract the usages laid down in the collective agreement.

Thus far it makes no practical difference whether the collective agreement be considered to be a contract or a memorandum of usage. In both cases the terms of the individual contract of employment could be held to conform to it and could be enforced in court to the same extent. In both cases the terms of the individual employment could,

if the express stipulation were made, vary from those laid down in the collective labor agreement; for even if the collective agreement is a contract requiring certain terms, a contract may be violated. But it may not be violated without liability to the other parties to it; and, in addition, one sometimes runs up against an injunction. For this reason the collective labor agreement would have more force as a contract than as a memorandum of usage.

The question of the consent of the individual parties to collective labor agreements, consequently, is not a question of whether they can be bound to each other as employer and employee, but a question of whether workers and employers can and do, by virtue of membership in labor unions and employers' associations which enter into agreements, authorize the limitation of their freedom to contract with each other as individuals.⁴⁴ There is, also, the further question of whether they can in a similar manner incur certain duties, such as the duty not to incite strikes or lockouts, which are independent of the creation of individual employment relations. In connection with both questions two matters must be considered: the matter of agency and consent, and the matter of public policy. It is the former alone which is under consideration at this point.⁴⁵

In all of the cases cited above in which a collective labor agreement was vindicated in damages or protected by an injunction and in which either the plaintiff or the defendant was an individual party who had become such by virtue of membership in an organization, it was implicit that the indi-

44. Much as one selling a business through an agent may, through that agent, limit his future freedom to engage in business. But in the case of the worker and employer, of course, there is no sale to which to attach the limitation upon freedom.

45. The matter of public policy is, of course, all-important, involving, as it does, the doctrine of restraint of trade, the anti-trust acts, and constitutional provisions, in addition to far-reaching social considerations. It cannot, however, be taken up in this article, which is a preliminary analytical study of the legal nature of collective labor agreements, assuming them to be valid from the standpoint of public policy, as they undoubtedly are to a large extent.

vidual parties had given adequate consent to what was taken to be a valid collective contract.⁴⁶ There are occasional cases in which the question of the consent given by individual parties to collective labor agreements has been taken up explicitly and decided favorably to the contract view.

In *A. R. Barnes and Co. et al. v. Berry et al.*,⁴⁷ the court considered the nature of the collective labor agreement which was involved but which, as it turned out, had never been finally concluded. The opinion is far from satisfactory as a whole, but it seems to state accurately the relation between the collective agreement and the individual employment contracts of the printers and their employees. "The provisions of the [collective] contract," says the court, "upon its being entered into become terms of the separate contracts of employment between each member of the Typothetae and the members of the union in his employ." In other words, the members of the Typothetae and the members of the union authorize their organizations to enter into a contract which shall, in a manner binding them as against the other parties to the agreement, lay down the terms upon which they shall, by maintaining their employment relations, contract as individuals. It is submitted that this view—leaving public policy and economic expediency out of account—is fundamentally sound. There is nothing impossible about the legal relations which it postulates and it is substantially true to the facts and to the understanding of the parties. It leaves room, furthermore, for the fixing not only of wages, hours, and the like, between employer and employee, but also of the rights and obligations which exist under a collective contract between each worker or employer and all the rest of the parties, independently of particular contracts of employment.⁴⁸

46. See *Schlesinger et al. v. Quinto et al.*, Ga., Fla., & Ala. R. Co., and *Gilchrist Co. v. Local Union 44*, *supra*.

47. 169 Fed. 225 (C. C. A., 1909).

48. Such as the rights and duties enforced in *Schlesinger et al. v. Quinto et al.* and in *Herman Leveranz v. Cleveland Home Brewing Co.*, *supra*.

The view just outlined is followed with variations in two cases in the New York Supreme Court. In *Keysaw v. Dotterweich Brewing Co.*,⁴⁹ the plaintiff was a workman suing for overtime pay due him under the terms of a collective labor agreement. The court held that "It was competent to show by parol that the defendant recognized the fact that the plaintiff was working for it under this contract, the parties thus adopting the contract made in form with the plaintiff's union." In *Gulla v. Barton*,⁵⁰ the court permitted a brewery worker to recover back pay of \$9 a week for 49 weeks. The plaintiff had been working for a weekly wage of \$9, ignorant of the fact that the collective agreement of his union with his employer entitled him to \$18. The union finally protested and the plaintiff filed suit. In the language of the court, "The agreement referred to was a valid contract which may be enforced in any proper manner The union entered into the contract for the benefit of the plaintiff and all other employees in the defendant's brewery and for the benefit of all union workmen."

In *Moody v. Model Window Glass Co.*,⁵¹ the national agreement between the window glass workers and their employers was involved. The agreement provided that in the event workers were induced to come to a plant from other cities by a promise of employment which subsequently was not fulfilled they were to be paid either \$20 a week for lost time or all the expenses incurred. Defendants had come from California to Arkansas in response to a letter which promised employment. They lost five weeks' time when the plant to which they came did not open as promised, at the end of the first two of which they were paid \$40. The company brought suit to recover the \$40 and the defendants filed a counterclaim for \$60 to cover the other three weeks of lost time. Judgment was for the defendants both in the

49. 121 App. Div. 58; 105 N. Y. Supp. 562 (1907).

50. 164 App. Div. 293; 149 N. Y. Supp. 952 (1914).

51. 145 Ark. 197; 224 S. W. 436 (1920).

original action and upon the counterclaim, the court holding that the plaintiff and the defendants acted with reference to the national agreement, the applicable terms of which should accordingly be enforced.

Even if it be considered as settled, however, that individual employers and workers do become parties to collective labor agreements in a binding manner and that their contractual rights and duties are clearly defined, the problem of the formation of these contracts is not entirely solved. The agreements would still be effective only in part unless the collective parties were also bound and subjected to their specific rights and duties. Whether these parties are so bound is a subject which remains to be considered.

The difficulties in this connection are manifold and are of so obvious a nature in the present state of the law as to have caused many writers to believe that they were the only obstacles in the way of holding collective labor agreements to be full-fledged contracts. For over a score of years centering about the year 1900 there was waged a dispute as to whether or not trade unions and employers' associations should become incorporated; and the assumption was made in almost all the arguments on both sides⁵² that incorporation would of itself in some manner make collective labor agreements enforceable as contracts.

The anachronisms and anomalies in the legal status of unincorporated associations, which were sought to be remedied by the incorporation proposal, are too numerous and complicated to be gone into here. Suffice it to say that it is an open question whether such associations exist at all in the eyes of the law. For a long time they undoubtedly did not; they were regarded as mere collections of individuals indistinguishable from their members; and their names were but collective pseudonyms for the individuals composing

52. A considerable number of these opinions is collected in *The Incorporation of Unions*, by Joseph M. Klamon, a Master's thesis at Yale University (1924).

them.⁵³ All of their rights and duties were reducible to rights and duties of their members jointly or jointly and severally. Their creation, consequently, raised all the questions already taken up in the discussion of the purely individual rights and duties of employers and workers under collective labor agreements; and their enforcement gave rise to almost insuperable difficulties in connection with the jurisdiction of courts, the parties to be included in actions, and the apportionment of liabilities and benefits. Equity afforded some relief by means of representative actions, but this was available only in equity cases and did not affect the question of the capacity of the unincorporated groups to enter into agreements in the first place.

In one way or another, as is apparent from cases already cited, means have been found in some instances to hold that labor unions and employers' associations, as entities, did assume contractual rights and duties when they entered into collective labor agreements, as well as to enforce those rights and duties in court.⁵⁴ Common-sense notions bear out the view which is implicit in these cases, however much certain of them may be at variance with precedent. Labor unions and employers' associations are distinct entities and are constantly being dealt with and referred to as such. They act as entities when they enter into collective labor agreements. In that or any other connection there seems to be no good reason for holding, simply because of more or less outworn common-law doctrines, that they cannot assume enforceable rights and duties. If the legislature, for reasons of policy, wishes to enact a contrary rule, it can do so, thus

53. The older common law of the matter is well set forth in an article on *Unincorporated Associations as Parties to Actions*, by Wesley A. Sturgis, 23 *Yale Law J.* 393 (Feb., 1924). An excellent longer presentation is contained in *Wrightington, Unincorporated Associations*, 2nd ed., 1923; Little, Brown & Co.

54. See *Lovely et al. v. Gill et al.*, *Nederlandsch-Amerikansche Stoomvaart Maatschappij v. Stevedores' and Longshoremen's Benevolent Society et al.*, and *Schlesinger et al. v. Quinto et al.*

expressly creating an anomaly in the law. Such was the view taken by the United States Supreme Court in the now famous case of *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, where it was held by way of dictum that a labor union is an entity which is suable as such for damages arising from its violation of the anti-trust act. Thus it can commit a wrong and be sued for it.⁵⁵ It would seem to follow that it can enter into a contract and sue or be sued upon it.

Thus, in so far as the view of the *Coronado* case comes to be adopted by the courts, an important bar to holding that collective labor agreements are contracts will be lowered.

6. THE LARGER VIEW.

If the foregoing pages have succeeded in their purpose they have, in addition to showing the diversity of opinion over the legal problem connected with collective labor agreements, demonstrated that careful analysis leads to the view that these agreements might well be considered to be contracts. At each step necessary to this conclusion there is much reason and some authority in its support, and its conscious adoption would lead to a more coherent, logical body of decisions than that which exists at present. Individual parties on each side, including business concerns, would be held to have bound themselves, through their organizations as agents, to specific rights and duties. Some of these would simply be restrictive upon the future liberty of these parties to fix the terms of their employment relations; and the terms actually fixed thereafter for each individual employment would be assumed to be in conformity to the agreement.

55. Whether there is residual liability in the members of a union for damages which cannot be satisfied out of organization funds, is a question which the *Coronado* case does not answer. Certainly there ought not be, in the absence of participation in the wrong by the individual member. So in the case of contracts the individual ought to be held in damages only for violation of his individual undertaking, as distinguished from the undertaking of his organization.

Other rights and duties would attach to the collective parties on each side; and each party, individual or collective, would be bound to all the others. With the law thus clarified, both the courts and the legislature could determine with greater assurance which of the specific rights and duties should, in view of sound public policy, be enforced.

It must be admitted, however, that there has been a touch of unreality about all this discussion. It has been assumed that the term, collective labor agreement, designates a kind of arrangement which is essentially the same in all instances. It has been taken for granted that the parties in all cases bind each other in much the same way and in similar words, and that therefore if one collective labor agreement is a contract virtually all such agreements are contracts. Needless to say, the assumption is not entirely true. Collective labor agreements are far from alike in phraseology or in the manner of their formation; and the constitutions of labor unions and employers' associations, which must constitute the authorization of the organizations to contract for their individual members, are still more varied.

The difficulty would be slight if workers and employers, or their leaders, kept it in mind. They would then be careful in framing the rules which govern their organizations and in concluding their agreements to phrase them exactly, with legal consequences in mind, much as ordinary business contracts are drawn up. Undoubtedly if such a policy were pursued collective labor agreements could be made either as binding contracts or as mere memoranda with no legal effect at all. But it may be too much to expect that such intelligence and conscious adaptation to the law should be displayed, and it may be that the courts will have to go on trying to interpret and apply poorly-drawn, inadequate agreements, now finding words which would make them legally binding and again being forced to exclude them from the category of contracts. In that

event it might be well for legislation to shift the basis of classification from the field of legal analysis to that of economic conditions by declaring all collective labor agreements, regardless of form and of legal analogies, to be one thing or another, with definite, uniform consequences. Other considerations point to the wisdom of such a course.

"Human interests," says Dean Roscoe Pound,⁵⁶ "will assert themselves continually in new ways, and significant institutions of every-day life often arise extra-legally and produce important results independent of or even against the law. For example, the law of contracts, the law of master and servant, the law of voluntary associations and the law of public service have but little relation to the actualities of modern industry, in which the laborer, or rather a group of laborers, has a vested right in the job not arising out of contract which is not lost during a strike, in which the conditions of employment are not fixed by law nor by the parties to the relation but by union rules, in which the relation is not individual but collective, in which bargains are made with and enforced on behalf of *de facto* entities that are not legal entities, and in which the obligations of public service do not apply to groups by which the most vital public services are in fact performed. Our logical analysis and logical deductions have failed here and we resort perforce to administrative action."

If we do not resort to administrative action we must at least resort to new rules and categories to guide judicial action. In any event we shall probably have to rely upon legislation to define and deal with the new state of affairs; and it may be questioned whether judicial legislation will suffice.

M. Leon Duguit expresses the opinion in connection with

56. "The Administrative Application of Legal Standards," an address before the section of public utility law of the American Bar Association, printed in v. 44 of the Reports of the Association, p. 445 (1919).

collective labor agreements⁵⁷ that there should be a recognition of the fact that such agreements are not contracts but are juridical acts of a distinct character. They are, he says in effect, agreements which lay down the law that is to govern the groups involved and which will, so far as possible, be extended to persons who do not participate in framing them. In short, they are unofficial legislative or administrative expressions; and it becomes, again, a question of policy how far the state shall recognize them and support them with sanctions. That policy can be framed with attention solely to facts and aims, if M. Duguit's view is correct, and without regard to the legal precedents and analogies which cluster about the concept of contract.

This view of collective agreements as aggregations of enacted rules has two large elements of reality, the first of which is the frequent identity between legislative rules and the rules laid down in collective labor agreements. In the words of Commissioners Commons and Harriman of the United States Industrial Relations Commission of 1913-16,⁵⁸ "A minimum wage law, for example, may differ in no respect from a joint agreement with a union, except that the one is enforced by legal penalties or threat of penalties, and the other by a strike or the threat of a strike." Similar obvious analogies exist between collective labor agreements and the decisions of bodies like the Kansas and Australian courts of industrial relations.

This "rules of the game" view of collective labor agreements finds its other strong support in the fact that the parties to these agreements almost always desire and frequently attempt to impose them upon other sections of the same trade or industry, which are not immediately party to them. The extent to which this shall be permitted is a subject of bitter controversy,⁵⁹ but a pretty definite recog-

57. 27 Yale Law Journal 753 (April, 1918).

58. V. 1 of the Report, p. 212.

59. As it was, for instance, in the case of Duplex Printing Co. v. Deering, 254 U. S. 443 (1921).

dition of the rule-making character of such agreements is contained in proposals for their extension by the state in proper cases. Such a proposal was advanced by the Industrial Council of the British Board of Trade in the report upon its Inquiry into Industrial Agreements.⁶⁰ In Germany the law provides for the extension of collective labor agreements in proper cases.⁶¹

On the continent of Europe, especially in France, jurists have gone much farther in analyzing the legal nature of collective labor agreements than they have in this country or in Great Britain, and their work has led to a much greater quantity of legislation dealing with the subject. An adequate study of the theories and the measures thus evolved is badly needed to throw light upon the problem in the United States.⁶²

Whether the solution here is to be found in the adoption of group-interest theories and in the enactment of legislation to secure these interests, or whether it is to be found in an adaptation of individualism and freedom of contract to new conditions, is not the subject under discussion in this article. What has been sought is a realization of the fact that there is an important legal problem in connection with collective labor agreements and an understanding of the general nature of that problem.

60. (1913). Reprinted as Bulletin 133 of the United States Bureau of Labor Statistics. Interestingly enough, the Industrial Council, while favoring the use of governmental power to extend the scope of collective labor agreements, opposed any use of that power to enforce them as between the original parties.

61. Reichsgesetzblatt, 1918, p. 1456.

62. French and German thought and legislation are briefly treated in English in two articles in the *International Labour Review*: *The Theory of Collective Labour Contracts in France*, by Gaeton Pirou (v. 5, no. 1, Jan., 1922), and *The Law of Collective Bargaining in Germany*, by Fritz Sitzler (v. 6, no. 4, Oct., 1922).